IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 122 OF 1989.

The Commissioner of Income-tax,
Bombay City-V, Bombay. ... Applicant.

V/s.

M/s K.C.A. Limited. ... Respondent.

Shri Ashok Kotangale i/b K.C. Sidhwa for the applicant.

Ms. V.B. Patel for the respondent.

CORAM : V.C.DAGA AND A.S.AGUIAR, JJ.

DATED : 13.7.2005

JUDGMENT : (Per V.C.Daga,J.)

. By this reference under section 256(1) of the Income-tax Act, 1961, (the 'Act') the Income Tax Appellate Tribunal has referred for the opinion of this Court questions of law arising from the order dated 28.5.1987 in I.T.A. No.1769/Bom/84 for the Assessment Year 1980-81 reproduced hereinbelow:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount received under the Central Government's outright grant of subsidy Scheme of 1971 for industrial units get up in selected backward districts or areas did not go to reduce the actual cost as defined in section 43(1) of the Income-tax Act, 1961 for the purpose of computing the depreciation for the assessment year 1980-81?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that deduction under sub-section (1) of section 35CC could not be denied to the assessee although the statement of expenditure which was required to be furnished under sub-section (3) of section 35CC had been furnished in the course of assessment proceedings and not with the return itself?

Question No.1:

2. Factual matrix with respect to this question reveals that the assessment year with which we are concerned is 1980-81, of which the accounting year ended on 31.12.1979 . In the relevant accounting year the assessee received a sum of Rs. 4,42,654/- as a cash subsidy on its 'New Vapi Project' from the Government of Gujarat. This amount was directly taken to the balance-sheet and credited to the capital reserve and shown as a liability under that head. The Income-tax Officer found that the assessee had received this sum under the Gujarat State Government Scheme for 15% outright grant or subsidy for industrial units in selected backward areas and growth centres. The subsidy amount had been calculated on the basis of investments made on the fixed assets by the company upto 30.6.1978. The investment of the assessee company came to Rs. 23,87,000/- on buildings and Rs. 35,54,000/- on plant and machinery. The Income-tax Officer came to the conclusion that the subsidy received by the assessee was towards meeting the cost incurred by the assessee in these investments and as such, in terms of the provisions of section 43(1) of the Income-tax Act, 1961, the depreciation should be allowed to the assessee only after deducting the said amount from the original costs of the assets.

The Income-tax Officer allotted Rs.1,77,851/-to buildings and the balance sum of Rs.2,64,803/- to plant and machinery out of the total subsidy of Rs. 4,42,654/-. He reduced the written down value of buildings and plant and machinery by these sums of Rs.1,77,851/- and Rs. 2,64,803/- respectively and allowed depreciation on the balance amount. The assessee went in appeal and the Commissioner of Income-tax (Appeals) relying on certain decisions of the Tribunal held that the subsidy amount was not to be deducted from the written down value of building plant and machinery for computing depreciation. The department came in appeal before the Tribunal and the ground raised was that the learned Commissioner of Income-tax (Appeals) had erred in directing the Income-tax Officer not to deduct the amount of subsidy of Rs. 4,42,654/- received from the Gujarat Government from the actual cost of the assets for allowing depreciation.

3. The Tribunal held that the scheme in question was similar to the Central Investment Subsidy Scheme. According to the Tribunal, the subsidy was given by way of incentive to establish industries in particular backward area. The whole purpose of subsidy was to encourage industries as a whole and not to meet the cost of any particular asset by providing incentive to lure the

entrepreneurs to move to particular areas. The subsidy, though measured as a percentage of the fixed investment which included investment made in land, buildings, plant and machinery etc. yet neverthless the subsidy amount could be utilised for any purpose included for the purpose of working capital or even for repaying the loans already borrowed. Thus, according to the Tribunal, there was no direct or indirect relationship to meet a portion of the actual cost and as such, the amount in question would not come within the ambit of the term "met" in section 43(1) of the Act and as such, the amount in question was not liable to be deducted from the written down value of land, buildings, plant and machinery for computing depreciation. The Tribunal relied on the decision of its Special Bench in the case of Pioneer Match Works (1982) 1 BOT 331.

4. This question relating to the grant of cash subsidy under the Central Government's outright grant of subsidy Scheme of 1971 for industrial units set up in selected backward districts or areas was a subject matter of consideration before the Apex Court in the case of **C.I.T. vs. P.J. Chemicals Ltd. (1994) 210 ITR 830 (SC)**, wherein the Apex Court was pleased to hold that subsidy in question did not reduce the actual cost as defined in sec.43(1) of the Income-tax Act, 1961 for the

purpose of computing the depreciation, as such the amount of subsidy is not to be deducted from the "actual cost" under section 43(1) for the purpose of calculation of depreciation. Since the question is covered by the aforesaid judgment of the Apex Court in the case of P.J. Chemicals Ltd. (supra), in that view of the matter, following the said judgment we answer the question in the affirmative i.e. in favour of the assesses and against the Revenue.

Question No.2: 5. As far as the factual aspect of the second question is concerned, it seems that the assessee had incurred expenses in the sum of Rs. 51,825/- on account of rural development. The assessee was, therefore, entitled to deduction of the said amount under sub-section (3) of section 35CC of the Income-tax Act. The Income-tax Officer rejected the claim on the ground that the condition mentioned in sub-section (3) of section 35CC regarding furnishing of particulars along with the return of income had not been fulfilled. The fact that the assessee had furnished the necessary particulars before the Inspecting Assistant Commissioner in the proceeding under section 144B that was not considered by the Income-tax Officer as sufficient compliance with the provisions of sub-section (3) of section 35CC of the Act. The

view taken by the Income-tax Officer was that the assessee would not be entitled to claim relief under the said provision since the particulars had not been filed along with the return. In the appeal filed by the assessee, the Commissioner of Income-tax (Appeals) relied on the decision of the Allahabad High Court in Addl.C.I.T. vs.Murlidhar Mathura Prasad (1979) 118 ITR 392 and held that filing of particulars in the proceedings under section 144B of the Act was sufficient compliance with the provisions of sub-section(3) of section 35CC of the Act. Since the Income-tax Officer had not considered the particulars contained in form No.3AA filed before the Inspecting Assistant Commissioner in the proceedings under section 144B, the learned Commissioner of Income-tax (Appeals) directed the Income-tax Officer to consider the assessee's claim on merits. Against this direction, the department came in appeal before the Tribunal.

6. The Tribunal observed that it was not disputed that the statement of expenditure in Form No.3AA issued by M/s R.H. Desai & Co., Chartered Accountant had been filed by the assessee in the course of assessment proceedings, as such, the question was whether deduction under sub-section(3) would not be allowable to the assessee merely because the statement had not been filed physically

with return itself but had been filed subsequent to the filing of the return in the course of assessment proceedings. The Tribunal discussed the decisions of various High Courts on the interpretation of similar words appearing in section 184(7) of the Act, viz. "furnishes along with return of income....." and held that requirement of furnishing along with the return was directory and not mandatory and that filing of statement of expenditure in the course of assessment was sufficient compliance with the provisions of sub-section (3) of section 35CC of the Act. The Tribunal held that all that the legislature intended was that the return should be duly filed and that the statement of expenditure should also be duly filed and that both these documents should be before the assessing authority at the time when the said authority is applying his mind to the assessment of that particular assessee. Consequently, according to the Tribunal, the condition in sub-section (3) of section 35CC for allowing deduction under sub-section (1) of section 35CC had been fulfilled. The Tribunal accordingly, confirmed the direction of the Commissioner of Income-tax (Appeals),

7. The answer to the said 2nd question, thus, centres around interpretation of sub-section (3) of section 35 CC of the Income-tax Act, 1961, wherein

sub-clause (3) thereof provides that no deduction shall be allowed in respect of expenses referred to in sub-section unless the assessee furnishes, **along with return of income for the assessment year**; for which deduction is claimed, a statement of such expenditure in the prescribed form duly signed and verified by an accountant as defined in sub-section (2) of section 288 along with particulars thereof. The aforesaid section, therefore, provides or rather makes it obligatory on the part of the assessee to furnish **along with return the details of expenditure referred to in section (1) in the prescribed form duly signed and verified by the accountant.** Now the question which falls for our consideration is whether or not it is mandatory to file statement of expenditure along with return of income for that particular assessment year.

8. The very same question referred to above was the subject matter of consideration of this Court in the case of **C.I.T. vs. Shivanand Electronics (1994) 209 ITR 63** while considering the provisions of sub-section (6A) of section 80-J of the Act which amongst other also provided the necessity of furnishing along with return of income; a statement of deductions claimed; duly audited with report in the prescribed form duly signed and verified by such Accountant.

9. While considering the above provision viz. sub-section (6A) of section 80-J as stood at the relevant time, the question was whether the requirement of a filing of statement along with return is mandatory or directory. The Division Bench of this Court in the case of Shivanand Electronics (supra) reached to the conclusion extracted hereinbelow:

> " The requirement of filing the audit report "along with the return of income" is directory and if the assessee complies with the same before completion of the assessment and offers a satisfactory explanation for his failure to submit the same in time, the Income-tax Officer may consider the same and examine the claim of the assessee for deduction under section 80J on the basis of such report."

Perusal of the aforesaid finding recorded by this Court shows that requirement of filing of report along with return of income is held to be directory. If the assessee acquires and files such report complying with the requirement of section 80-J(6A) before completion of assessment, the Income-tax Officer is required to consider and examine the claim of the assessee for deduction under section 80J on the basis of such report.

10. Having seen the finding recorded by this

Court while considering the provision of section 80-J (6A) of the Act, it is now necessary to compare sub-section (3) of section 35CC with that of section 80-J (6A) of the Act to examine and consider the applicability of the said judgment for deciding the present case. Section 80J (6A) and sec. 35CC(3) read as under:

Sub-section (6A) of section 80-J	**Section 35CC(3)**
"Where the assessee is a person other than a company or a co-operative society, the deduction under sub-section (1) from profits and gains derived from an industrial undertaking shall not be admissible unless the accounts of the industrial undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant."	"No deduction shall be allowed in respect of the expenditure referred to in sub-section (1) unless the assessee furnishes, along with the return of income for the assessment year for which the deduction is claimed, a statement of such expenditure in the prescribed form duly signed and verified by accountant as defined in the Explanation below sub-section (2) of section 288 and setting forth such particulars as may be prescribed"

11. The comparison of the above two sub-sections of the same legislation, put side by side, goes to show that both provisions require filing of statement along with return of income. To the extent it requires filing of statement, both provisions can be said to be paramateria. If that

be so, the interpretation put by this Court on the provision of section 80-J (6A) shall equally hold good so far as requirement of filing of the statement along with return of income under sub-section (3) of section 35CC is concerned and the same view would be justified.

12. In the above view of the matter, we are of the opinion that provisions of section 35CC(3)of the Act which provides for filing of statement of expenses along with return for that particular assessment year is directory. The Tribunal was thus justified in holding that the statement of expenses which was required to be furnished under sub-section (3) of section 35CC along with return could be furnished during the course of assessment. Reference is accordingly answered in the affirmative i.e. in favour of assessee and against the revenue.

. Reference accordingly stands disposed of with no order as to costs.

(A.S. AGUIAR),J.) **(V.C.DAGA,J.)**